90-842

(2)

Supreme Court, U.S.
FILED
NOV 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AIR WISCONSIN PILOTS PROTECTION COMMITTEE, JAMES M. FENSKE, GARY M. PELACH, RICHARD J. MAGIERA and THOMAS K. BLY,

Petitioners,

vs.

CLIFFORD R. SANDERSON, TRUSTEE and ACTING CHAIRMAN OF AIR WISCONSIN MASTER EXECUTIVE COUNCIL, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

ARTHUR M. WISEHART
Counsel of Record
WISEHART & KOCH
Attorneys for Petitioners
25 West 43rd Street
New York, New York 10036
(212) 730-0044

34

TABLE OF CONTENTS FOR APPENDIX

	Page
Order of the Supreme Court of the United States, dated October 20, 1990	1a
Judgment of the United States Court of Appeals for the Seventh Circuit, dated July 30, 1990	2a
Judgment of the United States District Court for the Northern District of Illinois, dated May 30, 1989	3a
Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, dated May 26, 1989	4a
Pertinent Portion of Plaintiffs' Statement of Genuine Issues Necessary to be Litigated, dated February 21, 1989	21a
Pertinent Portion of Affidavit of Thomas K. Bly, dated February 9, 1989	24a
Pertinent Portion of Affidavit of James A. Jakawich, dated February 8, 1989	26a
Pertinent Portion of Affidavit of John W. Whittlesey, dated February 8, 1989	29a

SUPREME COURT OF THE UNITED STATES

No. A-304

Air Wisconsin Pilots Protection Committee, et al.,

Petitioners

v.

Clifford R. Sanderson, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including November 27, 1990.

/s/John Paul Stevens

Associate Justice of the Supreme Court of the United States

Dated this 20th day of October, 1990.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT — WITH ORAL ARGUMENT

Date: July 30, 1990

BEFORE: Honorable Richard A. Posner, Circuit Judge

Honorable Joel M. Flaum, Circuit Judge

Honorable Michael S. Kanne, Circuit Judge

No. 89-3350

AIR WISCONSIN PILOTS PROTECTION COMMITTEE, JAMES M. FENSKE, GARY M. PELACH, RICHARD J. MAGIERA and THOMAS K. BLY,

Plaintiffs-Appellants

v.

CLIFFORD R. SANDERSON, Trustee and Acting Chairman of Air Wisconsin Master Executive Council, AIR LINE PILOTS ASSOCIATION INTERNATIONAL, WILLIAM P. HALE, Trustee and DENNIS HIGGINS, Trustee,

Defendants-Appellees

Appeal from the United States District Court for the Norther District of Illinois, Eastern Division
No. 87 C 3382, Judge James B. Zagel

The cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS
Eastern Division

AIR WISCONSIN PILOTS PROTECTION COMMITTEE, et al

v.

CLIFFORD R. SANDERSON, et al

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 87 C 3382
Judge Zagel

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED, the defendants' motion for summary judgment is granted.

Date: May 30, 1989

H. STUART CUNNINGHAM
Clerk

*/s/*Don Walker
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AIR WISCONSIN PILOTS PROTECTION COMMITTEE, JAMES M. FENSKE, GARY M. PELACH, RICHARD J. MAGIERA, and THOMAS K. BLY,	)	NO. 87 C 3382
Plaintiffs,	)	HONORABLE JAMES B. ZAGEL
CLIFFORD R. SANDERSON, Trustee, and Chairman of AIR WISCONSIN MASTER EXECUTIVE COUNCIL; and AIR LINE PILOTS ASSOCIATION INTERNATIONAL,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiffs,[1] pilots employed by Air Wisconsin, Inc., (ARW or Air Wisconsin), are dissatisfied with their collective bargaining representative, the Air Line Pilots Association, International (ALPA). ALPA is, and was at all times relevant to this litigation, the certified collective bargaining representative under the Railway Labor Act (RLA), 45 U.S.C. sec. 151 *et seq.*, for the pilots employed by Air Wisconsin. After failing to obtain their desired relief from the National Mediation Board plaintiffs bring their grievances to federal court. Plaintiffs complain that ALPA

[1] Plaintiff, Air Wisconsin Pilots Protection Committee (AWPPC), is an association whose membership consists of many Air Wisconsin pilots. James M. Fenske is a pilot for ARW, Chairman of the Master Executive Committee (MEC) established by ALPA, and a member of the AWPPC. Gary M. Pelach is a pilot for ARW, Secretary-Treasurer of the MEC and a member of the AWPPC. Richard J. Magiera is a pilot for ARW as well as a member of the MEC, Local Council 50 and the AWPPC. Thomas K. Bly, a pilot for ARW, is Chairman of AWPPC and a member of Local Council 50. Plaintiffs are referred to collectively as AWPPC.

violated its duty of fair representation by refusing to revise the arbitrated seniority list as requested by the AWPPC, that the imposition of the trusteeship violated Title III of the Landrum-Griffin Act and that certain defendants breached their fiduciary obligations. Defendants[2] seek summary judgment in their favor. On May 5, 1989, oral arguments were presented before this court on the Summary Judgment Motion.

I. FACTS

A. *The Seniority List*

This litigation arises out of the May 1985 merger of Air Wisconsin with Mississippi Valley Air Lines, Inc. (MVA). MVA pilots were also represented by ALPA. Mergers are frequent in the air travel industry, and ALPA has established a merger policy set forth in a document entitled "Merger Policies and Related Employee Protective Provisions of January 1985" (Merger Policy).[3] One question which must be resolved when airline companies merge is how to integrate the seniority lists of the carriers; this is a significant concern and close to the hearts of the pilots because seniority affects such issues as the pilot's job security, route assignment and equipment. ALPA's Merger Policy establishes a set of seniority integration procedures and guidelines which were applicable to resolution of the pilot seniority issues arising in this case.

---

[2] On September 2, 1987, Air Wisconsin, Inc. was dismissed as a defendant because it was neither a necessary nor indispensable party. The remaining parties are: ALPA; Clifford Sanders, a United Airlines Pilot, who was appointed by ALPA as Trustee and Acting Chairman of the Air Wisconsin Master Executive Council; William P. Hale, who succeeded Sanderson as Trustee; and Dennis Higgins, who succeeded Hale. Defendants are referred to collectively as ALPA.

[3] The Merger Policy was formed by the ALPA Board of Directors and the ALPA Executive Board, the governing bodies of ALPA, who under ALPA's Constitution and Bylaws have the powers to establish policy for ALPA. Plaintiffs do not contest the authority of these bodies to form policy.

When the representatives of the pilot groups were unable to resolve the seniority issues through direct negotiations, they proceeded to arbitration.[4] The integration of the pilot seniority lists was resolved by the Arbitration Board chaired by Arbitrator Rolf Valtin. According to the Merger Policy the arbitration award, here the Valtin Award, is final and binding on all parties and must be defended by ALPA (Merger Policy para. G-8 (Sec. 45.01.04)). A number of pre-merger ARW pilots were unhappy with the Valtin Award, they felt that pre-merger MVA pilots received higher seniority status than a number of pre-merger ARW pilots, thus depriving ARW pilots of the benefits to which they were entitled.

These pilots, including plaintiffs, attempted, on several occasions, to have the arbitrated seniority list changed to reflect length of service, although they had failed to achieve this at the arbitration proceeding. Plaintiffs sought reconsideration of the Valtin Award, which was not granted. A number of ARW pilots sought to form a voluntary association named North American Pilots Association (NAPA) to replace ALPA as their bargaining representative.[5] On October 3, 1986, the Air Wisconsin Master Executive Council (MEC) met to consider the seniority problem because the former MVA pilots refused to modify the arbitrated seniority provisions that were incorporated in the collective bargaining agreement.[6] On October 6, 1986, Plaintiff Fenske,

---

[4] Pursuant to the Merger Policy, two pilot merger representatives are chosen from each ALPA represented pilot group to negotiate an integrated seniority list. If they are unsuccessful in direct negotiation, arbitration is mandatory. (Merger Policy para. G-1 at 6 (Sec. 45.01.04).) An arbitration proceeding to integrate the seniority list is held before a neutral arbitration board, and the only parties are the pilot groups. In addition, in this case, the parties entered into a "fence agreement" providing for an arbitrated, integrated seniority list in the event that the representatives of the two groups could not reach an agreement.

[5] On May 12, 1986, in a representation election held by the National Mediation Board in accordance with the RLA, the ARW pilots voted to retain ALPA as their certified representative. *Air Wisconsin, Inc.*, 13 NMB 231 (1986).

[6] ALPA's internal structure is established by its Constitution and Bylaws. For each ALPA represented airline there are established Local Councils and a

(Footnote continued)

Chairman of the MEC, acting on a petition of Local Council 50 representatives, sent a letter to all Air Wisconsin pilots enclosing an "adjusted length of service seniority list proposal" and a secret ballot which asked recipients to mark whether or not the proposed seniority list should be adopted. The letter indicated that if a majority of the ballots affirmed the proposal it would pass.[7] On October 16, ALPA's national secretary, Charles J. Pierce, sent a letter to Fenske stating the mailing to Air Wisconsin pilots constituted an attempt to change the arbitrated seniority list in contravention of ALPA policy. Pierce directed Fenske to impound the ballots without counting them. ALPA's President, Henry A. Duffy, also wrote to Fenske reiterating Pierce's directive and warning that failure to comply would warrant consideration of whether a trusteeship should be imposed under Article XIX of ALPA's Constitution and Bylaws. Despite these warnings the ballots were counted, and it was reported to the MEC that the tally was 85-22 in favor of the resolution.

After a trusteeship was imposed on the MEC, the Committee adopted a resolution that sought to have ALPA "withdraw the proposed imposition of a trusteeship and to have ALPA sign a letter agreement with Air Wisconsin amending the Air Wisconsin contract and seniority list . . ." (Complaint, para. 40.) ALPA's President Duffy refused to sign the proposed agreement revising the seniority list set forth in the arbitration award. On January 17, 1989, the National Mediation Board conducted another ballot election in which the Air Wisconsin pilots rejected plaintiffs' attempt to replace ALPA as the exclusive bargaining representative of the pilots with another organization sponsored by plaintiffs.

Master Executive Council. In 1986, following the merger of ARW and MVA, two Local Councils existed at Air Wisconsin, Local Council 50 (consisting of primarily pre-merger ARW pilots) and Local Council 21 (consisting of mainly pre-merger MVA pilots). There was also an Air Wisconsin MEC with two representatives from Local Council 50 and two from Local Council 21.

[7] According to plaintiffs this ballot was not for purposes of contravening ALPA policy, but was merely for the purpose of soliciting views on the issue of seniority for future guidance.

B. *The Trusteeship Proceedings*

On October 27, 1986, ALPA President Duffy noticed charges against Air Wisconsin MEC members and officers (including plaintiffs Fenske, Pelach and Magiera) and notified them that the ALPA Executive Board would convene on November 16 to consider the proposed trusteeship of the ARW Local Council Representatives, the MEC and the MEC officers.

The Executive Board convened as scheduled; plaintiffs received an evidentiary hearing on the charges and were allowed to present a defense.[8] The Executive Board Chairman stated that counsel may be present as an advisor on behalf of any party but would not be allowed to address the body or actively participate in the hearing. Plaintiffs Fenske, Pelach and Magiera were present for the MEC. ALPA's Secretary Pierce presented the case on behalf of ALPA. On November 19, the Executive Board adopted resolutions to impose a trusteeship on the ARW MEC and Local 50 to remove plaintiffs from their ALPA positions as officers or representatives.[9] The Executive Board found that plaintiffs' efforts to change the arbitration award issued under ALPA's Merger Policy violated ALPA Policy. To allow such action would enable the larger pilot group in a merger to disregard the rights of the smaller pilot group. The decisions of ALPA's President and Executive Board regarding the trusteeship were affirmed by ALPA's Board of Directors in October, 1988.[10]

---

[8] Article XIX of the ALPA Constitution authorizes the President of ALPA, with the approval of the Executive Board, to impose a trusteeship on an MEC or Local Council and to remove any of the officers or representatives for violation or failure to comply with any of the provisions of ALPA's Constitution and Bylaws or policies. The procedural requirement for notice and a fair hearing before the Executive Board when a trusteeship is under consideration is also set forth in Article XIX.

[9] The Executive Board found that the Council 21 representatives did not participate in the actions requiring corrective action and did not impose a trusteeship over that council. There is no longer a trusteeship over Local Council 50, it was lifted once ALPA's President found that it could run its own affairs.

[10] The Board of Directors is ALPA's highest governing body. Pursuant to Article VII, Section 2, its interpretation of the Constitution and Bylaws governs ALPA in the conduct of its business and affairs.

Captain Clifford R. Sanderon, a United Air Lines pilot, Executive Vice-President of ALPA and Chairman of the United Air Lines ALPA Local Council based in Chicago, was appointed Trustee for the ARW MEC by the Executive Board. The continuation of the trusteeship was considered at each regular meeting of ALPA's Executive Board, and in each case the Executive Board resolved to keep the trusteeship in effect.[11] President Duffy replaced Trustee Sanderson with Captain William P. Hale, a current and pre-merger Air Wisconsin pilot. Upon his resignation he was replaced by Dennis Higgins of ALPA's national organizing department.

II. DISCUSSION

A. *Summary Judgment Standard of Review*

A motion for summary judgment should be granted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). All facts and inferences must be viewed in the light most favorable to the party opposing the motion. The moving party has the burden of proving that there is not an issue of material fact requiring a trial. *Adickes v. S. H. Kress & Co.*, 90 S. Ct. 1598, 1608 (1970). A successful opposition to a summary judgment motion, however, requires that the nonmovant provide specific fact supporting the existence of a genuine issue of material fact for trial. *Anderson v. Liberty*, 106 S. Ct. 2505 (1986).

B. *Duty of Fair Representation*

Plaintiffs claim that defendants violated their duty of fair representation because they refused to renegotiate the arbitrated seniority list to reflect the wishes of the Air Wisconsin pilots represented by ALPA. This refusal, according to the AWPPC, is inconsistent with ALPA's established policy, and thus constitutes another violation of their duty of representation.

---

[11] According to defendants the continuation of the trusteeship was reviewed at meetings in May and November, 1987 and May and September, 1988.

1. ALPA's Duty

The statutory duty of fair representation is a judicially created rule developed in the 1940's in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the RLA. *Vaca v. Sipes*, 87 S. Ct. 903, 910 (1967); *Steele v. Louisville*, 65 S. Ct. 226 (1944). The duty of fair representation protects individuals – denied their traditional forms of redress by the provisions of federal labor law – from arbitrary union conduct. *Vaca*, 87 S. Ct. at 912. Under the rule the union, which has the statutory authority to represent the members of a given unit as an exclusive bargaining representative under the RLA, is obligated "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* at 910. The Supreme Court's interpretation of the duty of representation, however, grants bargaining representatives broad discretion because, frequently, decisions which disparately affect union members cannot be avoided. *Ford Motor Co. v. Huffman*, 73 S. Ct. 681, 338 (1953) ("[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents. . ."); *Zipes v. Trans World Airlines. Inc.*, 846 F.2d 434 (7th Cir. 1988). Thus the Seventh Circuit has limited suits for breach of the duty of representation to instances of intentional misconduct by the union. *Dober v. Roadway Exp., Inc.*, 707 F.2d 292, 294 434 (7th Cir. 1983). *Hoffman v. Lonza, Inc.*, 658 F.2d 519, 522 (1981).

Plaintiffs assert that ALPA's failure to renegotiate the seniority list to reflect the wishes of the alleged majority of ARW pilots violates the duty of fair representation. If all that is required of ALPA is to effectuate the desires of the majority, the intricacies of the collective bargaining process frequently would be superfluous, often all that would be necessary is an organized vote of the employees and a representative to confer with the employer. Contrary to plaintiffs' contention, the duty of fair representation does require acknowledgment of the minority position. *Dober*, 707 F.2d 292, 295 (duty of fair representation provides some protection to minority from oppression by the majority); *Alvey v. General Electric Co.*, 622 F.2d 1279, 1289 (7th

Cir. 1980) (a union cannot accede to the will of the majority if to do so would result in arbitrary, discriminatory or bad faith disregard for the rights of the minority). Thus, if ALPA had changed the seniority list after it had been developed pursuant to their Merger Policy and after arbitration, ALPA could have been guilty of arbitrary conduct and discrimination against the minority in violation of the duty of fair representation.[12] Plaintiffs' claim that ALPA violated its duty because it failed to effectuate the will of the majority has no basis in law.

2. ALPA's Merger Policy

Plaintiffs argue that ALPA violated its own stated policies by refusing to revise the seniority list. According to plaintiffs the arbitration award serves only an interim purpose and once it is integrated into the collective bargaining agreement the seniority list is subject to renegotiation. ALPA's refusal to renegotiate the list in violation of its own policy, say plaintiffs, constitutes misconduct in violation of the duty of fair representation. Review of the Merger Policy provides no insight on why plaintiffs conclude that an integrated seniority list is subject to renegotiation. Furthermore this theory does not seem plausible. If the list is subject to renegotiation in the bargaining agreement, then seniority cannot possible afford the security to pilots that makes the seniority list so crucial to the parties in this litigation.

Plaintiffs also argue that the Valtin Award did not conform to ALPA's Merger Policy because it did not establish seniority

---

[12] Pursuant to paragraph G-8 of the Merger Policy, ALPA is clearly required to uphold and defend the Valtin Award. (Merger Policy G-8, at 6 (Sec. 45.01.04) ("the Award of the Arbitration Board shall be final and binding on all the parties to the arbitration and shall be defended by ALPA").) Nonetheless plaintiffs assert that failure to "correct" the seniority list constitutes non-action which prejudices the strong interest of employees and it is a violation of their duty. Plaintiffs cite *International Brotherhood of Electric Workers v. Foust*, 99 S. Ct. 2121 (1979), for the proposition that deliberate non-action in the face of a duty to act is a classic example of the breach of the duty of fair representation. This argument must fail; clearly ALPA's duty was to uphold the arbitrated seniority list.

status in accordance with the date of hire of each pilot.[13] Public policy favors private settlement of labor disputes without the intervention of government, and the grounds are very narrow for vacating an arbitration award under federal labor law. *United Paperworkers v. Misco, Inc.*, 108 S. Ct. 364, 370-71 (1987); *Dreis & Krump Mfg. Co. v. I.A.M.*, 802 F.2d 247, 253-54 (7th Cir. 1986). Plaintiffs cite *Beardsley v. Chicago & Northwestern Transportation Co.*, 850 F.2d 1255 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 1341 (1989), for the proposition that fair treatment of seniority interests of employees by a bargaining representative is so important that judicial relief is available, even when there has been arbitration. The *Beardsley* court, however, dealt with a limited situation where the arbitration award was vacated because there was an improper arbitration proceeding and the arbitrator acted beyond his authority.

It is true, as plaintiffs assert, that the document which embodies the Merger Policy specifies in the "General Policy" Section, para. B-1 (Section 45.02.01) that with respect to pilots being hired seniority will be based on the "date of hire." This clause refers to pilots' status when hired by the airline, and has nothing to do with the policy regarding seniority lists in the context of a merger. Provisions in the Merger Policy regarding establishment of a seniority list upon merger allow consideration of several factors including date of hire, length of service, type of equipment, number of pilots on furlough, and route structures.[14] We find no basis in the Merger Policy to justify tampering with the arbitrated seniority list.

---

[13] A fair representation challenge to an arbitration award must be asserted within six months of the award. *Bonds v. Coca- Cola*, 806 F.2d 1324, 1326 (7th Cir. 1986). The award was rendered in October, 1985. Not only is plaintiffs' claim without merit, it is also time barred by the applicable statute of limitation.

[14] Plaintiffs' argument that date of hire is the only criteria for determining seniority in the merger context means ignoring two specific provisions in the Merger Policy which provide otherwise. Paragraph H-1, at page 6 (Section 45.01.05) of the Merger Policy states that:

(Footnote continued)

Generally the judiciary will refrain from interfering with the internal affairs of the union. *Calhoon v. Harvey*, 85 S. Ct. 292, 299 (1964); *Gustafson v. American Train Dispatchers' Ass'n*, 788 F.2d 1284, 1287 (7th Cir. 1986); *Rota v. Brotherhood of Railway Airline and Steamship Clerks*, 489 F.2d 998, 1003 (7th Cir. 1973), *cert. denied.*, 94 S. Ct. 896 (1974). Judicial intervention in union disputes should be undertaken with great reluctance; consequently, a union's interpretation of its own constitution and bylaws will be disturbed only when it is a patently unreasonable construction of the documents. *Local Union No. 657 v. Sidell*, 552 F.2d 1250, 1257 (7th Cir.), *cert. denied*, 98 S. Ct. 190 (1977). When the Executive Board reviewed the arbitration award issue in November 1986, it found that any effort to change the final and binding nature of the arbitration award violated ALPA's Merger Policy. This ruling was affirmed by ALPA's Board of Directors in October, 1988. Clearly the deference afforded a union's interpretation of its constitution and bylaws extends to ALPA's Merger Policy which was developed by ALPA's Executive Board pursuant to authority under the ALPA Constitution and Bylaws. We defer to ALPA's interpretation of its rules and policies and we find no misconduct on the part of defendants that constitutes a violation of the duty of fair representation.

B. *The Trusteeship*

Plaintiffs contend that the trusteeship over the ARW MEC was imposed in violation of the Labor-Management Reporting

---

No inference should be drawn from anything contained in this policy that any one method of integrating the seniority lists is preferable to any other method except that no integrated list shall be constructed which would change the order of the flight deck operating crew members on their own respective seniority lists.

Paragraph F-4 at page 5 (Section 45.01.03) states that in negotiating an integrated seniority list:

. . . merger representatives should consider, but are not limited to, any or all of the following factors in determining a solution: Date of hire, length of service, type of equipment, number of pilots on furlough, route structures and any other factors mutually acceptable to the participants.

and Disclosure Act of 1959 (LMRDA), which governs the establishment of trusteeships by labor organizations. A trusteeship must be established in accordance with the Constitution and Bylaws of the organization which has assumed trusteeship and for ". . . the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organizations." 29 U.S.C. sec. 462.

During the first eighteen months, once a court has concluded that a trusteeship was imposed in a procedurally proper manner, that trusteeship is presumed valid unless it can be proven by clear and convincing evidence that the trusteeship was not established in good faith for a purpose allowable under section 462. 29 U.S.C. sec. 464(c). *See Teamsters Local 406 v. Crane*, 848 F.2d 709, 713 (6th Cir. 1988). After the first eighteen months, the presumption of validity of the trusteeship ceases, and it must be discontinued unless the union can show "by clear and convincing proof that the continuation of the trusteeship is necessary for a purpose allowable under section 462." 29 U.S.C. Sec. 464(c).

If we find that defendants had a legitimate purpose for imposing the trusteeship on the ARW MEC and afforded plaintiffs their procedural rights, then we will not interfere in the internal affairs of ALPA. Defendants' stated purpose for imposing the trusteeship is that the plaintiffs and their sympathizers disturbed ALPA's ability to function properly in its capacity as Air Wisconsin Pilots' collective bargaining representative. This is a permissible purpose for imposition of a trusteeship. *See Teamsters Local 406*, 848 F.2d at 715 (6th Cir. 1988). The pilots had agreed among themselves to abide by an arbitration award if direct negotiations were unsuccessful; plaintiffs should have also been aware that the Union's policy required that ALPA uphold any arbitrated award as final and binding. The facts attest that plaintiffs sought on a continued basis to persuade ALPA officials to revise the seniority list, and plaintiffs made the seniority list a predominate issue at meetings. The ALPA

Board's judgment that the trusteeship was necessary to protect the functioning of ALPA in their capacity as ARW's recognized bargaining representative was proper.

Section 464(c) of the LMRDA provides that for a trusteeship to be valid it must be "established by a labor organization in conformity with the procedural requirements of its constitution and bylaws and authorized or ratified after a fair hearing . . . before the executive board . . . . " ALPA's Constitution and Bylaws provide that before a trusteeship is imposed the charged party or entity shall be given "written notice of the charges, a reasonable time to prepare a defense and shall be afforded a full and fair hearing before the Executive Board on no less than 20 . . . days written notice." Plaintiffs do not dispute that they were given adequate notice and that a hearing was held; plaintiffs complain that they were denied their procedural rights because they did not have the opportunity to mount a proper defense and they were not permitted to retain counsel on their behalf.

A trusteeship under the LMRDA must comply with fundamental notions of due process, but it need not meet all the requirements of formal judicial proceedings. *See Jolly v. Gorman*, 428 F.2d 960, 967-68 (5th Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971); *Hardy v. Int'l Bhd. of Boilermakers*, 682 F. Supp. 1323, 1329 (E.D. Pa. 1988). Plaintiffs do not substantiate their allegation that they were denied sufficient time to prepare their defense with any evidence. Plaintiffs were given the twenty days' notice of charge and hearing as anticipated by ALPA' s Constitution and we have no basis to find that the pilots were not given a fair opportunity to present their case.

Plaintiffs complain that they were prevented from having legal counsel to represent them. Neither the LMRDA nor ALPA's Constitution establish a right to counsel, and the fact that the charged party was not allowed to have counsel present will not render the hearing procedurally defective. *Tam v. Rutledge*, 475 F. Supp. 559, 569 (D. Haw. 1979). *See Curtis v. Int'l Alliance of Theatrical Stage Employees*, 687 F.2d 1024, 1027-29 (7th Cir. 1982) (a member has no right to counsel at a union disciplinary

hearing even where as a result of the expulsion from the union he lost his job, the court of appeals found that "Congress did not expressly include a right to counsel in the Landrum-Griffin Act and the legislative history reveals that the action was deliberate").[15] We find that the trusteeship was properly imposed.[16]

Plaintiffs argue that the trusteeship was not imposed in good faith, and offer two theories to support this claim. First, plaintiffs argue that the trusteeship was unnecessary because before plaintiffs could effectuate any changes they needed President Duffy's signature. This argument is unpersuasive, the trusteeship was imposed because, as the facts show, plaintiffs were deliberately attempting to change the seniority list in contravention of ALPA's clear policy and were generally uncooperative with ALPA.

---

[15] Plaintiffs add a new argument in their Response to the Motion for Summary Judgment to show they were denied due process. They argue that the Executive Board is made up of pilot representatives from other ALPA represented airlines who had a "conflict of interest." This claim is not properly pleaded. In any event the Executive Board who heard plaintiffs' case was properly established pursuant to ALPA's Constitution, and there is no evidence presented that any member of the Board acted with undue influence.

[16] In 1987 a complaint was filed with the Department of Labor (DOL), on behalf of Air Wisconsin MEC, contending that the establishment of the trusteeship over ARW MEC violated the LMRDA. The DOL rejected complainant's allegations that a fair and full hearing had not been conducted before the establishment of the trusteeship and found that the hearing complied with the requirements of ALPA's Constitution and the requirements of the LMRDA. The DOL also rejected complainant's argument that the trusteeship was imposed for an unlawful reason and concluded that the trusteeship comported with the purposes of the LMRDA. The DOL refused to review the complaints regarding the trustee because it had no jurisdiction over the conduct of the trustee when no financial mismanagement or election improprieties were alleged. The DOL concluded that their investigation revealed no actionable violation of the LMRDA.

The DOL also dismissed a complaint regarding the administration of the trusteeship in April, 1988. The DOL concluded that its investigation disclosed no violation of the LMRDA which would warrant the DOL's institution of a lawsuit challenging the ARW MEC trusteeship.

Second, plaintiffs claim that the motive behind imposing the trusteeship was to deprive Fenske, MEC Chairman, of his authority. At the oral argument plaintiffs cite to *Lamb v. Miller*, 660 F.2d 792 (D.C. Cir. 1981), for the proposition that if enough evidence of impermissible motivation is shown in the removal of a representative, a factual issue is raised which must be resolved by the trier of fact. *Lamb* involved the suspension of a union representative, in this case Fenske has not been removed, and there is no indication that he is barred from holding any office. In addition, evidence of ALPA's good faith is the fact that they withdrew the trusteeship over Local 50 when they found it was no longer necessary to ensure ALPA's proper functioning. Recognizing the deficiency in their argument plaintiffs provide additional arguments in their Response to the Motion for Summary Judgment to show that plaintiffs acted in bad faith. Plaintiffs now argue that the trusteeship chilled their freedom of speech and denied them their right to vote. These claims have never been pleaded and are not properly before this court. In any event, these claims are without merit.

The LMRDA, 29 U.S.C. sec. 411(a)(2), grants to members of labor organizations the right to express opinions or arguments subject to the union's "reasonable rules as to the responsibility of every member toward the organization . . . and to his refraining from conduct which would interfere with its performance of its legal or contractual obligations." Plaintiffs argue that the October 6, 1986, letter to ARW MEC members was merely a solicitation from the membership of their views regarding the lists, to be used for future guidance, and that by impounding the balloting ALPA chilled membership free speech.

Plaintiffs offer *Sheet Metal Workers' Int'l Ass'n v. Lynn*, 109 S. Ct. 639 (1989), as authority that defendants' conduct was improper. Their reliance on *Lynn* is misplaced. In *Lynn* a local union business agent was removed from office "in retaliation for statements he made at a union meeting in opposition to a proposed dues increase." *Id.* at 641. The Court found that this was a retaliatory removal for Lynn's exercise of his membership right of speech and was not legitimately related to any union concern. *Id.* at 644. Here plaintiff's conduct was in violation

of union rules, and *Lynn* is not applicable. Furthermore, Fenske was not barred from holding any positions and in fact was re-elected as Local Council Representative in March 1988.

Reviewing the facts (in the light most favorable to plaintiff) we can only find that the balloting was an attempt to change the seniority list. Plaintiffs clearly considered it an authoritative ballot and used it to urge a change in the seniority list on several occasions. Therefore, Fenske, when he implemented the balloting procedure under color of his authority as MEC chairman, was in direct violation of ALPA policy. ALPA's Constitution and Bylaws provide that MEC and Local members can be removed for failure to comply with ALPA policies. (ALPA Constitution Art. IV, Section 2.C).

Plaintiffs' contention that they were denied the right to vote because their October 6 resolution was not recognized by ALPA is similarly without support. There is no membership right to vote. Plaintiffs' only possible basis for finding a right to vote is in 29 U.S.C. sec. 411 which provides that where a right to vote is created by the union's constitution or bylaws or by statute, it must be extended on an equal basis among the members. Plaintiffs were not entitled to vote on a referendum which violated ALPA policy.

Having found that the trusteeship was imposed in good faith and pursuant to procedural requirements, we presume it was valid during the first eighteen months; defendants have also provided clear and convincing evidence that the trusteeship was appropriately maintained beyond May, 1988. At regular meetings of the ALPA Executive Board the question of the trusteeship was reviewed, and it was resolved at each meeting that its continuation was essential to ALPA's functioning. We note again that the trusteeship over the Local Council was removed when it was no longer found necessary. Defendants have presented evidence of conduct which jeopardized ALPA's functioning to justify continuation of the trusteeship. Specifically, on March 2, 1988, Plaintiff Fenske, who acted as Local Council representative and MEC member, demanded that Trustee Hale sign the proposed collective bargaining agreement with

ARW changing the seniority list. On March 9, 1988, plaintiffs moved before this court to have Hale added as a defendant to this action because he refused to sign the agreement. The record shows that plaintiffs persisted in their efforts to revise the seniority list by making it a controversial issue which monopolized MEC meetings.[17] The continuation of the trusteeship beyond eighteen months was clearly justified.

C. *Fiduciary Duties*

29 U.S.C. sec. 501(a) charges certain fiduciary duties to the officers and other representatives of a labor organization who occupy positions of trust with respect to the organization and its members. 501(a) requires that such fiduciaries:

> . . . refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interest of such organization. . . .

Plaintiffs find that defendants breached their 501 duty and provided the following examples: 1) when the Board imposed the trusteeship and refused to represent the wishes of the ARW bargaining unit, 2) the appointment of Trustee Sanderson who allegedly has a conflict of interest because he was a pilot and an officer at a competitor airline, United Air Lines, 3) the abrupt resignation of Trustee Hale which was suspect because it occurred at the time Air Wisconsin job opportunities were being usurped by the ALPA unit of United Airline pilots, 4) Trustee Higgins breached his fiduciary duties by impounding a questionnaire sent out by ALPA to ascertain views on renegotiation of the contract, and 5) the misrepresentations by Higgins to ARW pilots regarding the ALPA committee meeting that voted to continue the trusteeship and regarding certain financial matters to

---

[17] Defendants cite as an example the MEC meeting on May 3, 1988, where two MEC members and pre-merger ARW pilots by means of a roll call vote procedure purported to pass resolutions revoking certain of Trustee Hale's powers and directing Hale to recommend unconditional removal of the trusteeship at the May, 1988 meeting of the Executive Board.

induce a vote in favor of retaining ALPA as representative. On the basis of the uncontroverted facts we find no substance to plaintiffs' claim of fiduciary breach by Sanderson, Hale or Higgins. The fact that Sanderson was a United Air Lines pilot and an ALPA local official representing certain United pilots during part of the time he was a trustee, in and of itself does not prove that ARW suffered any injury or that there was a conflict of interest. Plaintiffs merely state this conclusory allegation and have not shown any conflict of interest which can be addressed. Sanderson states in his declaration that these facts did not influence him as a trustee, and plaintiffs have not shown otherwise. Similarly plaintiffs' allegations regarding Hale's resignation and Higgins's letter sent during representation elections are conclusory and fail to demonstrate any breach of fiduciary duty.

III. CONCLUSION

Plaintiffs have failed to provide any facts to support the existence of a genuine issue of material fact necessary for trial. As discussed above, there is no basis for plaintiffs' claims that defendants violated their duty of representation, breached their fiduciary duty or imposed a trusteeship unlawfully. The arguments which plaintiffs provide to support their main contention that ALPA was obligated to revise the arbitrated seniority list are primarily conclusory and without merit.

Summary judgment in favor of defendants is granted.

Enter:

/s/James B. Zagel
James B. Zagel
United States District Judge

Date: May 26, 1989

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AIR WISCONSIN PILOTS PROTECTION COMMITTEE, JAMES M. FENSKE, GARY M. PELACH, RICHARD J. MAGIERA, and THOMAS K. BLY,	Civil Action 87 C 3382 Judge James B. Zagel
Plaintiffs,	
— against —	
CLIFFORD R. SANDERSON, Trustee, and Acting Chariman of AIR WISCONSIN MASTER EXECUTIVE COUNCIL: AIR LINE PILOTS ASSOCIATION, INTERNATIONAL: WILLIAM P. HALE, Trustee, and DENNIS HIGGINS, Trustee,	
Defendants.	

PLAINTIFFS' STATEMENT OF GENUINE ISSUES NECESSARY TO BE LITIGATED

In accordance with Rule 12(f) of the Rules of this Court, plaintiffs submit this statement of the genuine issues which are necessary to be litigated.

1. There is a disputed issue of fact as to the credibility of the claim by defendant Air Lines Pilots Association ("ALPA"), as set forth in its letter dated November 25, 1986, signed by Henry A. Duffy, President (Complaint Ex. I), that the trusteeship was imposed because it was "necessary" and the statement of the Executive Board in ¶ 11 of the resolutions annexed thereto that "immediate corrective action is necessary ... to assure compliance with [ALPA's] Constitution and By-Laws and policy", etc.

Evidence that said claim was a pretext and that the true motive was retaliation against and punishment of plaintiff Fenske and other Air Wisconsin pilots because Fenske was held responsible by the officers of ALPA for the petitioning for a representation election by an independent union in May 1986 (Complaint ¶ 29) is found in:

(a) The affidavits of Fenske (¶¶ 103-110), Bly (¶¶ 8-11, 13) and Whittlesey (¶¶ 19-20, 23) (i) showing a reasonable basis for Fenske's belief that his actions were in compliance with ALPA's Constitution and By-Laws and policies, and his responsibilities as the Chairman of the MEC, a unit of ALPA for the representation of the interests of the Air Wisconsin pilots, and (ii) that the position of Duffy was at variance with ALPA's well-established seniority policies as well as the free speech rights of the Air Wisconsin Pilots, and the representations under which ALPA originally obtained bargaining rights from an independent union for Air Wisconsin pilots;

(b) The undeniable fact that the document entitled "Letter of Agreement" containing the proposed amendments to the collective bargaining agreement as proffered by plaintiff Fenske and the MEC before the imposition of the trusteeship (Complaint Ex. H) was specifically prepared *for the signature* of Henry A. Duffy as president of ALPA. This meant that at all times Duffy had it in his power to approve or disapprove the proposed document before it could become effective, in his capacity as president of ALPA, as specifically provided in Article XVIII Section 1 of the Constitution and By-Laws. Thus the claim of defendants that the trusteeship for the removal of Fenske and other officers of the MEC was either "needed" or was "corrective action", the only basis permitted for such drastic action under the ALPA Consitution and By-Laws, is false and a sham;

(c) The Jakawich affidavit referring to statements by ALPA officers about Fenske and Jakawich as to the true motive for the punitive actions against them by ALPA, and the retaliatory actions by ALPA against other Air Wisconsin pilots who were identified with the election sought by an independent union, or for exercising their free speech rights (Jakawich Aff. ¶¶ 3, 6, 7-9.)

(d) Other evidence that the acts of the defendants were a pretext to avoid liability in this litigation or the election of an independent union is found in the Fenske Affidavit at ¶¶ 91-101.

2. A further credibility issue is raised as to the claim by defendants that there is a "clear and convincing" need for the continuation of the trusteeship (Defendants' Statement of Material Facts ¶¶ 22-26, 30) and that the continuation of the trusteeship is "warranted" for a "legitimate" object is a pretext and a sham as shown by the further undeniable fact that, in the negotiation of a new collective bargaining agreement at the present time, pursuant to the reopening notice given by Duffy under Section 6 of the Railway Labor Act, Duffy has made it clear that any new agreement would require his signature in order to become effective (Fergus Aff. ¶ 5, Exhibit B to Fergus Aff.). Thus defendants can show no evidence whatsoever, much less the "clear and convincing" evidence required by law, for the continuation of the trusteeship, since the power to approve a new agreement is and at all times has been within the hands of Duffy. The true purpose of the trusteeship and its continuation therefore is and at all times has been to suppress and punish the exercise of the rights of free speech of the majority of the Air Wisconsin pilots who seek thereby to persuade the hierarchy within ALPA that their interests should be listened to and accommodated rather than stifled and suppressed. (Fenske Aff. ¶¶ 103-110.)

AFFIDAVIT OF THOMAS K. BLY

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

THOMAS K. BLY, being duly sworn, deposes and says:

1. I am a plaintiff in the above action and respectfully submit this affidavit on personal knowledge in opposition to defendants' motion for a summary judgment.

2. I am President of the Air Wisconsin Pilots Association and am also a member of the Air Line Pilots Association.

* * * * *

40. In addition, because Leonard is Air Wisconsin's Vice-President of Flight Operations, the "Operation Looking Glass" activities of ALPA designed to harass ALPA's opponents, is particularly prejudicial and injurious because information generated by "Operation-Looking Glass" would be brought to his attention as the Vice-President of Flight Operations of Air Wisconsin.

41. The prejudicial purpose and effect of "Operation Looking Glass" is further shown by the fact that the "Operation-Looking Glass" forms were distributed *only* to pilots favoring ALPA's coercive tactics as a means of intimidating those pilots who seek enforcement of their rights of free speech and freedom of association.

42. Further coercive acts by ALPA involve disciplinary action against James Fenske and James Jakawich infringing such rights, as shown in their affidavits.

43. In addition, defendants have threatened ruinous future assessments in amounts unknown relating to costs of trusteeship, if ALWA should become the bargaining representative. These threats were stated in my presence by Trustee Higgins for the obvious purpose of intimidating and coercing the pilots of Air Wisconsin in their choice of a bargaining representative.

44. Whether Captain Hale resigned as the ALPA trustee because of frustration with ALPA or not, he did state that he would have to do things ALPA wanted him to do that he didn't want to do, and he had to get out, so he resigned as trustee. Also, to my certain knowledge, Captain Hale signed a card calling for a representation election to replace ALPA as bargaining representative at the request of the Air Wisonsin Pilots Association in November 1988.

45. Such acts of defendants including the impounding of ballots and the suppression of responses to questionnaires were in violation of the free speech and other rights quaranteed to Air Wisconsin pilots by LMRDA § 101 (29 U.S.C. § 411 (a)(2) to vote and be heard in the negotiation of a new collective bargaining agreement that will have an important bearing upon their future rights and interests.

For all of the above reasons, the motion of defendants for summary judgment should be denied and this case should be scheduled for an early trial.

Respectfully submitted,

s/s Thomas K. Bly
Thomas K. Bly

Sworn to before me this
9th day February, 1989:

s/s Kirk L. Bigelow
Notary Public

AFFIDAVIT OF JAMES A. JAKAWICH

STATE OF INDIANA)
) ss.:
COUNTY OF ALLEN)

JAMES A. JAKAWICH, being duly sworn, deposes and says:

1. I am a pilot of Air Wisconsin Inc. and respectfully submit this affidavit in opposition to the motion for summary judgment by the defendants in the above-entitled litigation.

2. This affidavit and the statements of fact herein contained are true and correct to the best of my knowledge, information and belief, and are made on the basis of personal knowledge.

* * * * *

6. The reasons given for my suspension (although in violation of my rights under Section 101 of the Labor Management Reporting and Disclosure Act), were a pretext. The ALPA trustee, defendant Higgins in this litigation, told me on November 16, 1988, that my activities involving Horizon were not the real reason that I was thrown out by ALPA; he stated, "You were thrown out because you supported NAPA as an officer of ALPA." NAPA is the independent union of Air Wisconsin pilots now called Air Wisconsin Pilots' Association.

7. Similarly, in November 1988, Captain Doug Tufte, another Air Wisconsin pilot called to inform me that charges had been filed against him by ALPA officials to expel him from ALPA for violations of the ALPA Constitution and By-Laws relating to his support for the Air Wisconsin Pilots' Association. He told me that the offer was made to drop the charges if he would withdraw his support for the AWPA. Again, this widely publicized action was deliberately meant to intimidate supporters of the AWPA.

8. Further evidence of such coercion and retaliation by ALPA and interference with the rights of individuals is shown by the

fact that the secretary of ALPA, Larry Schulte, told me in May 1988, that the general consensus among the officers of ALPA was that James Fenske, plaintiff in this litigation, was responsible for the NAPA (AWPA) movement that challenged ALPA's position as the Air Wisconsin pilots' bargaining representative in May of 1986. Fenske was the MEC Chairman at Air Wisconsin at that time and shortly after the vote, Mr. Fenske was removed from office by ALPA, and in further retailiation the MEC and the local council that supported NAPA (AWPA) were placed in trusteeship, where they remain today as an example of what happens to anyone who challenges ALPA.

9. "Operation Looking Glass" is an onging campaign of coercive surveillance sponsored by ALPA to turn in any Air Wisconsin pilots supportive of AWPA suspected of the slightest infractions. Postcards were selectively distributed only to ALPA supporters in the pilot group for use in reporting information, so it is clear that the surveillance system was discriminatory and designed exclusively to harass and punish AWPA supporters. They were addressed to "Operation Looking Glass" at a post office box in Moline, Illinois and the records at the post office carried ALPA as a recipient. In this manner, selective enforcement of regulations could be used as a tool to blackmail AWPA supporters. (*See* Exhibit C annexed hereto.)

10. During February 1988, I was involved in a situation involving disciplinary action by the company and possible enforcement action by the FAA. Because of my public support for AWPA, numerous individuals from the pilot group contacted both the FAA and the company to turn me in and recommend severe punishment for my incident. This information was reported to me by Gordy Anderson, Director of Operations at Air Wisconsin, and Robert Young of the FAA.

11. In December 1988, Captain Ray Weber, another Air Wisconsin pilot, personally informed me that shortly after an organizational meeting where he expressed support for the AWPA, he experienced vandalism to his automobile in the airport parking lot. He believes that the vandalism was instigated by ALPA and is directly related to his support for the AWPA.

These and other facts are reasons why AWPA narrowly lost the recent representation election. But for such interference, intimidation and coercion by ALPA, AWPA would have won the election. Such actions by ALPA violate the rights of free speech and representation rights of myself and other Air Wisconsin pilots. The trusteeship imposed by ALPA directly infringes those rights.

Respectfully submitted,

/s/ James A. Jakawich
James A. Jakawich

Sworn to before me this
8th day of February, 1989:

/s/ Linda A. Gunsett
Notary Public Linda A. Gunsett

Expiration Date 6-11-91

AFFIDAVIT OF EXPERT WITNESS ON BEHALF OF PLAINTIFFS AND IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOHN W. WHITTLESEY, being duly sworn, deposes and says:

1. This affidavit is respectfully submitted in opposition to defendants' motion for summary judgment pursuant to Fed.R.Evid. 702.

2. I am an attorney who has specialized in collective bargaining since 1946. I have been labor attorney for the U.S. Chamber of Commerce; Federal Wage and Salary Stabilization Boards; a labor relations consulting firm; and since 1953, labor attorney for Union Carbide Corporation, then headquartered in New York City. I became Union Carbide's Chief Labor Counsel in January 1971 and continued in that position until September, 1982. Since then I have continued to specialize in matters involving arbitration and collective bargaining. I am currently Chairman of the Business Council of New York's Labor and Human Resources Committee, which develops policy for its business membership in these fields. For many years I was Chairman of the New York - New Jersey Arbitration Group, comprised of specialists engaged in labor arbitration. Also, until recently, I have been of counsel for Wisehart & Koch. At present I am counsel to the firm of Keane and Beane in White Plains, New York. I also have been a consultant to other firms on matters involving collective bargaining and arbitration.

3. I am fully familiar with the practices, custom and usage applicable to both collective bargaining and labor arbitration. I am a labor arbitrator. I both participate in and follow developments in labor arbitration and collective bargaining on a continuing basis. My position with Union Carbide involved

participation in all kinds of collective bargaining matters, both under the National Labor Relations Act and the Railway Labor Act.

4. The contention of defendants in this case amounts to a unilateral declaration that there can be no further collective bargaining by ALPA on the subject of the seniority standing of the pilots employed by ARW and that there can be no change in the seniority of those pilots at any time, regardless of circumstances, because of the effect of a 1985 arbitration award integrating seniority lists at the time of the merger of a smaller airline (Mississippi Valley) into Air Wisconsin in 1985. Therefore, states ALPA, defendants will not bargain over such issues with ARW at any time in the future. (Fenske Aff. ¶¶ 7, 8, 47)

5. It is well settled that the duty to bargain, while it may involve taking firm stands on the part of one or another party to negotiations, does not permit any party by fiat to keep any mandatory subject of bargaining away from the bargaining table, nor does it permit so-called union "policies" unilaterally to mandate such refusal to discuss a subject. Yet this is what defendants threaten to do, and they are asking this Court's support to sustain such an unlawful action.

6. The characterization of the Valtin arbitration award as fixed in the sense that its terms must continue unchanged forever and forever and thus preclude negotiations with respect to the seniority list it covers is false, and completely contrary to custom and usage in collective bargaining and with respect to such awards. (Valtin arbitraton award, Ex. D to Complaint)

7. The Valtin award constitutes what is known as "interest" arbitration. As such, it falls into a different category than grievances involving the interpretation or application of existing agreements.

8. "Interest" arbitration, rather than interpreting rights under an existing agreement, declares new terms for future application in a new agreement. As such, its end product is no different

than an agreement that is arrived at by negotiations in that by custom and usage it is intended and expected that it, too, will be subject to change in the future to reflect changing circumstances.

9. Thus, in accordance with such understanding, custom, and usage, the provisions of the Valtin award were incorporated into and made a part of the 1985-88 ALPA-ARW contract. (1985-88 ALPA-ARW contract, Ex. A to Fenske Aff.)

10. The provisions of the agreement governing expiration and renegotiation, then, as is standard custom, practice and usage, clearly contemplate and expect change in any and every section of the contract by negotiated agreement between the parties. As was stated in *The Railway Labor Act at Fifty*, p. 72, published by the National Mediation Board:

> "Section 6 notices in the airline industry normally open the full range of their agreements just as occurs in industry generally, where the entire contract expires."

11. It has been affiant's experience that that statement reflects custom, practice and usage in collective bargaining.

* * * * *

15. The arbitration award was satisfied by its incorporation into Section 12 of the merged working agreement between ALPA and Air Wisconsin. At that point, the jurisdiction of the Valtin Board ceased by virtue of its own statement and by application of the ALPA merger policies above quoted. The "final and binding" characterization of the award became merged into the contract and the provisions of the award, as is custom, practice and usage in interest arbitration, became subject to change *via* mandatory collective bargaining just as any other provision of the ARW-ALPA agreement.

16. Thus the Valtin award was "final and binding" only until it was incorporated in the merged ARW-ALPA bargaining working agreement. At that point, it continued in effect only as part

of that contract and only until the agreement becomes open for negotiation of a new agreement. All of such situations were and are in accordance with law, custom, practice and/or usage in collective bargaining and in the treatment of interest arbitration awards.